

NO. 42777-0-II
Cowlitz Co. Cause NO. 11-1-00334-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINE KAY WESTVANG,

Appellant.

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court did not err when it denied Ms. Westvang's motion to suppress evidence.
2. Ms. Westvang received the effective assistance of counsel.

B. STATEMENT OF THE CASE

1) Procedural History

On April 5, 2011, the Cowlitz County Prosecuting Attorney charged Christine Westvang with Possession of Methamphetamine with Intent to Deliver based on evidence that was found in her home on March 31, 2011. CP 1-2; RCW 69.50.401(1). Ms. Westvang filed a motion to suppress the evidence that was seized from her home on that date, and on June 16, 2011, the parties presented witnesses and argument before The Honorable James Stonier. RP 1-55; CP 3-5. The trial court denied the motion to suppress, concluding that the officers sought to enter Ms. Westvang's pursuant to legitimate investigatory purpose. RP 52-53; CP 66-68.

The case proceeded to trial on October 3, 2011, and the jury returned a guilty verdict later that day. RP 56-145; CP 64. On October 4,

2011, the court imposed a standard range sentence of 12 months and one day. CP 74. Ms. Westvang filed a timely notice of appeal. CP 82.

2) Statement of Facts

On March 31, 2011, Officer Spencer Harris and Detective Kevin Sawyer were part of a team conducting a fugitive sweep, and in particular they were seeking to locate Scott Miller and execute an arrest warrant for him. RP 3, 16; CP 66 (Findings of Fact #1). A citizen gave the officers an address, 1345 Baltimore Street #1 in Longview, that Mr. Miller frequented and where he may have been located. RP 3-4, 16; CP 66 (Findings of Fact #2). The officers proceeded to that address, knocked on the door, and contacted Ms. Westvang when she answered the door. RP 4-5, 16-17; CP 66 (Findings of Fact #3).

The officers explained to Ms. Westvang that they were at her home because they received information that Mr. Miller may be there. RP 6, 17-18; CP 66 (Findings of Fact #4). Ms. Westvang denied that Mr. Miller was in her home. RP 6, 18; (Findings of Fact #4). Officer Harris again explained to Ms. Westvang that they had information that Mr. Miller was in the home, and noticed that Ms. Westvang was nervous. RP 6. Based on this nervousness, Officer Harris believed that Ms. Westvang was not

being truthful and that she may have been hiding Mr. Miller in the home. RP 6. Officer Harris testified that this happens all the time. RP 6.

As a result, the officers asked if they could enter her home to look for Mr. Miller, that they would be in and out in a few minutes, and informed her that she did not have to let them into the home. RP 6-7, 18; CP 67 (Findings of Fact #5). Ms. Westvang, after again stating that Mr. Miller was not in her home, consented to the officers' entry and began showing them around the house. RP 7-8, 18-20; CP 67 (Findings of Fact #5, #6). The officers followed Ms. Westvang down a hallway and checked each of the rooms she pointed out before walking back to the living room area. RP 8, 20. The officers described Ms. Westvang as cooperative. RP 7, 19.

Upon returning the living room, Officer Harris noticed a desk that big enough for someone to hide behind. RP 9, 20; CP 67 (Findings of Fact #7). Consequently, he walked over to it to make sure Mr. Miller was not hiding there. RP 9, 20. At that point, Officer Harris noticed plastic baggies, functional scales, paraphernalia for smoking, crystal, which was believed to be and later confirmed to be methamphetamine and marijuana. RP 9-10, 21; CP 67 (Findings of Fact #7, #8). Consequently, Detective

Sawyer read Ms. Westvang her *Miranda* warnings, questioned her, and after she confessed the contraband was hers, placed her under arrest. RP 10, 22-25; CP 67 (Findings of Fact #9).

C. ARGUMENT

1.) POLICE LAWFULLY ENTERED MS. WESTVANG'S HOME AND LOOKED FOR MR. MILLER PURSUANT TO HER CONSENT.

Ms. Westvang does not challenge the trial court's findings of fact. *See* Br. of Appellant. When a trial court's findings are unchallenged, they are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). When reviewing the denial of a suppression motion, appellate courts apply a de novo standard of review to the conclusions of law on which the denial was based. *Id.*

a. Officers were not required to give Ms. Westvang *Ferrier* warnings.

Police officers may lawfully enter a person's home without a warrant if that person consents. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). The purpose for the entry controls what actions officers must undertake in order to get valid consent. *State v. Khounvichai*, 149 Wn.2d 557, 563-564, 69 P.3d 862 (2003). When officers' purpose for

obtaining consent to enter a home without a warrant is to search “for contraband or evidence of a crime,” they must, prior to entering, inform the person of the right to refuse or revoke consent and “of the right to limit the scope of the search.” *Id.*, at 559 *citing Ferrier*, 136 Wn.2d at 118.

On the other hand, when police seek to enter a home for other legitimate investigatory purposes, *Ferrier* warnings are not required. *Id.* at 563-564. Consequently, in cases subsequent to *Ferrier*, our Supreme Court has held that *Ferrier* warnings were not needed to obtain valid consent when officers requested entry into a home to question one of the residents about possible criminal behavior earlier in the night, when officers accompanied INS agents into a home to serve a presumptively valid deportation order, or when officers entered a third-party’s home to serve an arrest warrant on someone else inside the home. *Khounvichai*, 149 Wn.2d at 559; *Bustamante-Davila*, 138 Wn.2d at 983-984; *State v. Williams*, 142 Wash.2d 17, 19, 11 P.3d 714 (2000). Instead, where *Ferrier* warnings are not required, a totality of the circumstances test is employed

to determine whether the consent obtained was valid. *Bustamante-Davila*, 138 Wn.2d at 981.¹

These holdings correctly acknowledge that a requirement that officers “warn of the right to refuse entry every time an officer enters a home to investigate . . . would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry” and that “there is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes.” *Khounvichai*, 149 Wn.2d at 563-564. “*Ferrier* warnings target searches and not merely contacts between the police and individuals.” *Id.* As a result, when the police seek entry into a home for a legitimate investigatory purpose “the home is merely incidental to the purpose.” *Id.*

Williams is instructive. *See* 142 Wash.2d 17. There, a citizen contacted a police officer and informed him that the defendant had a warrant out for his arrest and was currently at a local residence. *Williams*, 142 Wash.2d at 19. The citizen told the officer that the defendant had a green van. *Id.* After confirming the warrant, the officer drove to the

¹ Ms. Westvang does not argue under this test that her consent was invalid, but only that the lack of *Ferrier* warnings invalidated the consent that she did give to the officers to enter her home.

described residence and noticed a green van parked outside. *Id.* The officer, with backup at this point, went to the doorway of the residence and was met by the tenant. *Id.* at 19-20.

The officer told the tenant that he was looking for the defendant and that the defendant's green van was parked outside. *Williams*, 142 Wash.2d at 20. The tenant denied knowing the defendant or who owned the green van, but did indicate there was a guest or guests at the home. *Id.* at 27. The officer informed the tenant that the defendant had a warrant for his arrest and asked for consent to enter and look for the defendant. *Id.* The tenant consented and immediately thereafter the officer entered, spotted the defendant, and arrested him. *Id.* A search of the defendant incident to his arrest turned up heroin. *Id.*

Williams found that the police "did not seek to enter [the tenant's] apartment to look for contraband or to arbitrarily search a home for a hidden guest," "reasonably conclude[d] that [the defendant] was inside," and "did not request permission to search the premises but only asked whether the defendant was inside." 142 Wash.2d at 27. Based on those findings, *Williams* held that "[c]onsidering the limited purpose of the police entry and that [the tenant] acknowledged that he had guests inside,

this case does not resemble a “knock and talk” warrantless search that *Ferrier* intended to prevent.” *Id.* Thus, the police officers’ entry into the tenant’s home was based on valid consent despite the absence of *Ferrier* warnings. *Id.* at 27-28.

This case is not meaningfully distinguishable from *Williams*. Both here and in *Williams*, officers were told by a citizen that the person sought, who had a warrant for his arrest, was likely present at a specific residence. RP 3-4, 16; CP 66 (Finding of Fact #2). In both cases, the officers sought consent to enter the residence from the person with authority over the home for the purpose of looking for the person for whom the warrant was issued. RP 6-7, 17-18; CP 67-68 (Findings of Fact #3-5). In addition, in each case, the person who answered the door had authority over the residence and denied the person sought was in the home but admitted that guests were at the home. RP 6, 17-18; CP 66 (Finding of Fact #4). Finally, in both instances the person with authority over the home consented to the officers’ entry for the purpose of allowing them to look for the person with the warrant. RP 7-8, 18-19; CP 67 (Finding of Fact #5). These similarities put this case on all fours with *Williams* and support the trial court’s conclusion that the officers obtained valid consent from

Ms. Westvang in order to enter her home for a legitimate investigatory purpose. CP 67-68 (Conclusions of Law #1, 3, 10). Also worth noting is that, here, unlike in *Williams*, the officers informed Ms. Westvang of her right to refuse to consent. RP 18; CP 67 (Finding of Fact #5), (Conclusion of Law #2).

Ms. Westvang's attempt to distinguish this case from *Williams* is unpersuasive.² In *Williams*, as Ms. Westvang points out, officers did have one piece of physical evidence potentially corroborating the defendant's presence in the home, i.e., the van. That van, however, was not definitively linked to the defendant prior to officers approaching the home and asking for consent. Instead, like the location of the defendant, it was just part of the tip given by the citizen.

Here, officers' reasonably believed that Mr. Miller was located in Ms. Westvang's home based on what they believed to be a reliable tip combined with Ms. Westvang's nervousness in response to their questions

² In addition, Ms. Westvang's reliance on *State v. Freepons*, 147 Wn.App. 689, 197 P.3d 682 (2008) is misplaced. There the officers' primary purpose for requesting consent to enter the home was to investigate a crime. *Freepons*, 147 Wn.App. at 160. Moreover, Ms. Westvang is incorrect that our Supreme Court is in agreement with the holding in *Freepons* because it denied review of the case. Br. of Appellant at 14. This contention is incorrect because our "Supreme Court's denial of review has never been taken as an expression of the court's implicit acceptance of an appellate court's decision." *Matia Contractors, Inc. v. City of Bellingham*, 144 Wash.App. 445, 452, 183 P.3d 1082 (2008).

about Mr. Miller. RP 6. This nervousness indicated to Officer Harris, based on his experience, that she may not be telling the truth in regard to Mr. Miller's presence within the home. RP 6. Thus, this singular factual difference (the van) between the cases cannot be enough to turn the officers' legitimate investigative purpose to enter Ms. Westvang's home, to locate and arrest Mr. Miller, into an arbitrary search of her home requiring *Ferrier* warnings.

Moreover, that the officers purpose for entering Ms. Westvang's home was a legitimate investigative one is especially true considering there is no contention the officers entered Ms. Westvang's home for the purpose of searching for contraband or evidence of a crime. Thus, this court should heed *Khoumvichai*, where our Supreme Court "reiterate[d] that [*Ferrier*] warnings are required *only* when police officers seek entry to conduct a consensual search for contraband or evidence of a crime," and affirm the trial court's conclusion that the officers sought to enter Ms. Westvang's residence for a legitimate investigatory purpose. 149 Wn.2d at 559. (emphasis added); CP 67 (Conclusion of Law #1).

- b. **The officers did not conduct a search under article I, section 7 when, after entering Ms. Westvang's home, they began to look for Mr. Miller and instead found drugs.**

The law "is well established" that under article I, section 7 "a discovery made in plain view is not a search." *Khounvichai*, 149 Wn.2d at 565 citing *State v. Miller*, 121 Wn. 153, 154, 209 P. 9 (1922). "The plain view discovery of evidence does not violate article I, section 7 if the police officer has a prior justification for the intrusion and the officer immediately recognizes that he has evidence before him." *Id.* Consequently, "if an officer observes evidence of a crime or contraband in plain view, he has not conducted a search." *Id.* at 566.

Here, the officers had a prior justification for the intrusion into Ms. Westvang's home, i.e., the legitimate investigatory purpose of looking for Mr. Miller, and immediately recognized that they had evidence before them when they approached the desk. RP 9-10, 21; CP 67 (Findings of Fact #7, #8). Thus, contrary to Ms. Westvang's assertion, the officers were not conducting a search as understood under article I, section 7, either before or at the time they found drugs and paraphernalia in plain view in

Ms. Westvang's home. Br. of Appellant 10-13. The discovery of evidence of a crime in plain view by officers after obtaining consent to enter a home for a legitimate investigatory purpose does not retrospectively vitiate the consent given nor turn it into a situation where *Ferrier* warnings should have been given prior to entering. *Khounvichai*, 149 Wn.2d at 566 (rejecting the argument that *Ferrier* warnings are required to obtain consent because "every entry potentially involves a plain view 'search.'"). As a result, this court should affirm the trial court's denial of Ms. Westvang's motion to suppress. CP 68 (Conclusion of Law #10).

2.) MS. WESTVANG RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). It is the defendant's burden to show ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to

demonstrate ineffective assistance: (1) counsel provided ineffective representation, and (2) counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Here, Ms. Westvang cannot show ineffective assistance of counsel because even if her trial counsel had raised the suppression issue regarding *Ferrier* warnings that Ms. Westvang now asserts on appeal the result of the suppression hearing would not have been different. As argued above, the officers were not required to give Ms. Westvang *Ferrier* warnings prior to obtaining her consent. Moreover, at the trial level despite Ms. Westvang's trial counsel not contesting consent on that point, the *Ferrier* issue was briefed and argued by the State, and considered by the trial court when it ruled that officers obtained valid consent from Ms. Westvang prior to entering her home. Thus, Ms. Westvang's trial counsel was not

ineffective for failing to raise an issue that the trial court actually considered and rejected.


D. CONCLUSION

For the reasons argued above, the denial of Ms. Westvang's motion to suppress should be affirmed.

Respectfully submitted this 9th day of May, 2012.

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APPENDIX A

RCW 69.50.401 - Prohibited acts: A — Penalties.

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers,

and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

[2005 c 218 § 1; 2003 c 53 § 331. Prior: 1998 c 290 § 1; 1998 c 82 § 2; 1997 c 71 § 2; 1996 c 205 § 2; 1989 c 271 § 104; 1987 c 458 § 4; 1979 c 67 § 1; 1973 2nd ex.s. c 2 § 1; 1971 ex.s. c 308 §69.50.401 .]


CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 11th, 2012.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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